

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JUSTIN GUY, individually and on
behalf of those similarly situated,

Plaintiff,

v.

Case No. 20-cv-12734-MAG-EAS
HON. MARK A. GOLDSMITH

ABSOPURE WATER COMPANY, LLC
a domestic limited liability company,

Defendant.

**DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO
USE SUMMARY CHART (EXHIBIT A FROM THIRD SUPPLEMENTAL
INITIAL DISCLOSURES) AS DEMONSTRATIVE AID AT TRIAL**

Defendant, ABSOPURE WATER COMPANY, LLC, by and through its attorneys, CUMMINGS, MCCLOREY, DAVIS & ACHO, PLC, by RONALD G. ACHO and MICHAEL O. CUMMINGS, pursuant to the Court's Order (Dkt. 166) hereby submits its response in opposition to Plaintiffs' motion to use summary chart (Exhibit A from their third supplemental initial disclosures) as a demonstrative aid at trial (Dkt. 172).

ARGUMENT

Plaintiffs' proposed "Exhibit A" from its Third Supplement Initial Disclosures (Dkt. 143-8, PageID.6722), which Plaintiffs propose to use as a demonstrative

exhibit, suffers from the fatal flaw that the vast majority of it will be based on hearsay. This “Exhibit A” purports to show be the estimated daily hours worked, based on start and end times, for 22 of the Plaintiffs. (*Id.*) However, Plaintiffs only plan “to call a representative sample of 5-10 Plaintiffs” at trial. (Dkt. 170, PageID.8155). For the other missing 12 to 17 Plaintiffs, Plaintiffs propose to only submit declarations. (Dkt. 172, PageID.8174). As Defendant has demonstrated, these declarations, without the witnesses testifying at trial, are clearly inadmissible hearsay. (Dkt. 162). Demonstrative exhibits cannot be based on inadmissible hearsay. *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1160 (11th Cir. 2004) (“Rule 1006 is not a back-door vehicle for the introduction of evidence which is otherwise inadmissible.”). Likewise, “Rule 611 merely gives the Court control over the mode and order of the presentation of evidence; it does not give the Court permission to circumvent hearsay rules.” *United States v. Bell*, Criminal Action No. 17-20183, 2022 WL 993634, at * 6 (E.D. Mich. April 1, 2022). “Exhibit A” will be as inadmissible as the declarations on which it purports to rely.

CONCLUSION

For the foregoing reasons, Defendant Absopure Water Company, LLC respectfully requests this Honorable Court to deny Plaintiffs’ motion to use a summary chart (Exhibit A from their third supplemental initial disclosures) as a demonstrative aid at trial.

Dated: October 23, 2023

Respectfully submitted,

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LOCAL RULE CERTIFICATION

I, Michael O. Cummings, certify that this document complies with Local Rule 5.1(a), including: double-spaced (except for quoted materials and footnotes); at least one- inch margins on the top, sides, and bottom; consecutive page numbering; and type size of all text and footnotes that is no smaller than 10-1/2 characters per inch (for non-proportional fonts) or 14 point (for proportional fonts). I also certify that it is the appropriate length. Local Rule 7.1(d)(3).

Dated: October 23, 2023

/s/ Michael O. Cummings

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2023, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification to all parties of record. I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants: None.

Dated: October 23, 2023

/s/ Michael O. Cummings

Michael O. Cummings